HAJI MOHAMED DOM v. SAKIMAN

[C. A. (Mathew C.J., Spenser Wilkinson and Hill JJ.) November 1, 1955]

[Ipoh — F.M. Civil Appeal No. 16 of 1955]

Civil Trial — Pleadings — Duty of a Judge to decide a case on the issues on the record.

In this case the plaintiff claimed specific performance of an agreement for the sale of a piece of land on a Malay Reservation. The agreement included a provision that if the transfer of the land was not effected a penalty would be paid. The defence was that the agreement for sale was a forgery. The learned trial Judge held that the agreement was genuine but he came to the conclusion that the document sued on was not a contract for the sale of land but was a contract relating to and connected with a loan made by the plaintiff either to the defendant or to somebody else for whom the defendant stood surety. As a result the learned trial Judge entered judgment for the plaintiff for $3,000 and costs. The plaintiff appealed against this decision.

Held: (1) it was nowhere alleged in the pleadings that the agreement was in the nature of a document of loan and therefore the learned Judge was wrong in deciding an issue which was not on the record; (2) once he found that the agreement for sale was a genuine document, the learned Judge had no alternative but to order specific performance or to award damages.

Case referred to :—

(1) *Blay v. Pollard & Morris* (1930) 1 K.B. 628.

COURT OF APPEAL.

M. S. Mahendran for the appellant.

S. M. Sharma for the respondent.

Mathew C.J. (with whom **Spenser Wilkinson J.** agreed) : — This is a claim for specific performance of an agreement for the sale of a parcel of land in a Malay Reservation. Included in the agreement was a provision that if the transfer of the land was not effected a penalty would be paid. The points for decision were :—

(a) did the defendant-respondent make the agreement for sale?

(b) if so, was the plaintiff-appellant entitled to specific performance or to damages?

The defence simply was that the agreement for sale was a forgery. There was much evidence given during the hearing of the case to the effect that the agreement for sale was part of a loan transaction. The learned trial Judge (quoting from his judgment) found :—

"That the document sued upon is genuine in the sense that it was written out on the date which it purports to bear and that it was signed by the defendant after it was written."

and came to the conclusion that the document sued on was not a contract for the sale of land, but was a contract relating to and connected with a loan made by the plaintiff either to the defendant or to somebody else for whom the defendant stood surety. As a result, the learned trial judge entered judgment for the plaintiff for $3,000 and costs. It is against this finding that the appeal is mainly directed.

Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial Judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v. Pollard & Morris*[1] (at page 634).

In my view, had the learned trial Judge not regarded the agreement as in the nature of a loan transaction and had directed his mind to the issue whether the order should be for specific performance or for damages, he would have come to the conclusion that an order for specific performance was the proper remedy.

I would allow this appeal with costs and order that judgment be entered for the appellant for specific performance of the agreement annexed to the plaint, and further order that the respondent do execute a valid and registrable transfer of the land in question in the appellant's favour. The deposit will be paid to the appellant's Solicitors.

Hill J. : — In the lower Court the plaintiff-appellant sued for specific performance on the following document :—

1 July, 1952.

Whereas on the date abovementioned I Sakiman bin Abdullah, I.C. Pk. No. 701666 have executed an agreement to be held by Haji Mohamed Dom bin Haji Mohd. to the effect that I, Sakiman bin Abdullah have sold my land E.M.R. 2623 Mukim Rungkup in area 4 acres 3. 34 Lot No. 2390 for $3,000 (dollars three thousand). This money was received by Sakiman in full. The transfer to take place after 3 months. If I, Sakiman, refuse to transfer the land to Haji Mohamed Dom I, Sakiman have to pay compensation to Haji Mohd. Dom as much as $6,000 in all (six thousand dollars).

This I, Sakiman, affix my signature hereunder and duly witnessed.

Witness — Signature of Seller

Sd. Arshad. — Sd. Sakiman,

It is perhaps convenient to repeat here the main part of the defence :—

Defendant says that on or about the 25th August, 1951, he at the request of the plaintiff signed his name as a witness to the signatures of one Mohamed Tahir the brother in law of the defendant on a document purporting to have been written in Romanised Malay and stated by the plaintiff to be the acknowledgment of a debt of $3,000 advanced by the plaintiff to the said Mohamed Tahir and repayable with interest thereon at $100 per month.

The defendant was and is unable to read or write Romanised Malay and signed the said document as a witness believing the allegation of the plaintiff as to the contents hereinabove stated.

On or about the 26th day of August, 1951, the plaintiff informed the defendant that the document executed the day before was invalid according to the advice he had received and it was proposed to make a fresh document importing the same terms. He further requested the defendant to put his signature on a paper in blank in order to save him the trouble of coming again, assuring him that his signature would be used as a witness to the signature of the said Mohamed Tahir. He also requested the defendant to show him his identity card. The defendant relying on the statement of the plaintiff put his signature to the blank paper and also produced his identity card to the plaintiff.

The learned trial Judge found it impossible to accept the evidence of either party as in every respect true, but came to the conclusion that the document sued upon was genuine in the sense that it was written out on the date which it purports to bear and that it was signed by the defendant after it was written.

When he came to consider the document itself the learned Judge was satisfied that it was not a contract for the sale of land but was a contract relating to and connected with a loan of money made by the plaintiff either to the defendant or to somebody else for whom the defendant stood surety. In coming to this finding of fact it seems clear that the learned trial Judge had in mind that the land referred to in the document sued upon was Malay Reservation land and that the plaintiff in order to secure a loan would have recourse to a document of this nature purporting to be a contract of sale. On this finding of fact judgment was entered for the plaintiff for $3,000 interest and costs.

It was argued on behalf of the plaintiff/appellant that having regard to the law, that is the Malay Reservation Enactment, Cap. 142, the learned trial Judge should have disregarded the question of a loan as such a loan was unenforceable and unrealisable against Malay Reservation land and should have held that the transaction between the parties was a contract for specific performance and was subject to the Land Code, 1926, the Contract Ordinance 1950 and the Specific Relief Ordinance 1950 and accordingly ordered specific performance.

I agree that the plaintiff was entitled to an Order for specific performance though not quite for the reasons put forward. I feel with respect that having found as a fact that the document was genuine in the sense that he did and, as there was no issue raised in the pleadings or in the evidence that the plaintiff had loaned money to the defendant, the learned trial Judge in accordance with the finding of fact regarding the document should have ordered specific performance.

I would therefore allow the plaintiff's appeal and order specific performance on the contract sued upon and order that the defendant do execute a valid and registrable transfer in favour of the plaintiff of the land held under E. M. R. Rungkup 2623 Lot 2390 free from all encumbrances. The plaintiff to have the costs of this appeal and refund of his deposit. The defendant's cross-appeal to be dismissed with forfeiture of deposit.

Since writing the above I have read the judgments in *Blay v. Pollard & Morris*[1]. I feel the judgments in this case, particularly that of Scrutton L.J. support the view I have expressed.

RENGASAMY v. ANNAMALAI

[C. A. (Mathew C.J., Whyatt C.J. (S) and Wilson J.) October 21, 1955]

[K. L. — F.M. Civil Appeal No. 22 of 1955]

Civil appeal — Contention on appeal that trial Court had no jurisdiction to try the case — Defect in jurisdiction must appear on the face of the proceedings.

This was an appeal from the decision of the High Court ordering *inter alia* "that the defendant do return to the plaintiff the eating-shop . . . with all chattels and fittings as described in the agreement dated the 30th day of July, 1951." At the appeal, counsel for the appellant contended that the agreement annexed to the plaint was a tenancy agreement and that the respondent should have applied to the Rent Control Board under s. 12 of the Control of Rent Ordinance 1948 for permission to the institution of the present suit and as the respondent had omitted to do so, the High Court had no jurisdiction. This point was not raised before the trial Court.

Held: (1) the appellant can only succeed on the jurisdiction issue if the defect in jurisdiction was patent on the face of the proceedings; (2) in this case the defect in jurisdiction was not patent on the face of the proceedings and therefore the appeal must be dismissed.

Cases referred to:—

(1) *Farquharson v. Morgan* (1894) 1 K.B. 552.

(2) *Buggin v. Bennett* 4 Burr. 2037.

CIVIL APPEAL.

H. L. Wrigglesworth for the appellant.

A. K. Sen for the respondent.

Mathew C.J. (with whom **Whyatt C.J.(S.)** and **Wilson J.** agreed) : — This is an appeal from the decision of the High Court ordering *inter alia* :—

"That the defendant do return to the plaintiff the eating-shop at No. 25 Camp Road, Port Swettenham, with all chattels and fittings as described in the agreement dated the 30th day of July, 1951."

Mr. Wrigglesworth for the appellant has contended that the agreement annexed to the plaint was a tenancy agreement, and that the respondent should have applied to the Rent Control Board under section 12